



Remcho Johansen & Purcell LLP

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by Kathryn Ross

*Kathryn Ross* Date:  
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1901 Harrison Street  
Suite 1550  
Oakland CA 94612

Oakland: 510.346.6200  
Sacramento: 916.264.1818  
www.rjp.com

July 12, 2018

Andrew Harris Werbrock  
510.346.6214  
aw@rjp.com

**VIA ELECTRONIC MAIL**

Jeff S. Jordan, Assistant General Counsel  
Federal Election Commission  
Office of Complaints Examination and Legal Administration  
Attn: Kathryn Ross, Paralegal  
1050 First Street, NE  
Washington, DC 20463  
cela@fec.gov

**Re: MUR 7384**

Dear Mr. Jordan:

As counsel to Andrew Janz for Congress (the "Committee") and Jay Petterson, Treasurer (collectively, "Respondents"), we write in response to the Complaint filed by Donald S. Priest on May 10, 2018. The Complaint itself admits that it "cannot determine an exact violation" of the Federal Election Campaign Act of 1971, as amended (the "Act") but nonetheless asserts that Respondents violated the law by either (1) failing to include a disclaimer on a postcard that advocated for Janz's election or (2) failing to properly disclose the postcard as a campaign contribution.<sup>1</sup> Both allegations lack merit. Respondents did not send the postcard in question; nor does the Complaint provide any evidence that the postcard was part of a mass mailing that was required to contain a disclaimer in the first instance. Moreover, while Respondents have at times encouraged volunteers to send handwritten postcards to voters, it has in each case reported the costs of any postage or postcards purchased by those volunteers as in-kind contributions, and is not aware of any individual sending more than 500 substantially similar postcards. Accordingly, there is no reason to believe that Respondents violated the Act, and the Commission should dismiss the Complaint.

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<sup>1</sup> Complaint at 1.

## LEGAL ANALYSIS

### **I. Respondents Did Not Violate The Act's Disclaimer Requirements**

The Complainant apparently received a single, hand-written postcard that was postmarked as sent from Oakland, California and, from this, presumes that Respondents sent the postcard and erroneously omitted a disclaimer.<sup>2</sup> This allegation is factually erroneous and legally flawed.

First, Respondents did not, in fact, send the postcard identified in the Complaint. The Committee's campaign manager has confirmed that the Committee did not send any postcards itself. Moreover, the Committee's campaign headquarters are located in Fresno and Visalia, California. It would be peculiar, to say the least, for the Committee to write a postcard in Visalia and then drive more than 200 miles to Oakland, California, only to have the postcard mailed back to Visalia.

Second, while the Complaint does not provide sufficient information for Respondents to determine who sent the postcard, it does not appear that a disclaimer was required here in any case. The Act and Commission regulations only require a disclaimer on printed materials if, in relevant part, they qualify as "public communications" and are distributed by a political committee or contain express advocacy.<sup>3</sup> A mailed advertisement only qualifies as a "public communication" if it is a "mass mailing," which is a mailing "of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period."<sup>4</sup> Mail pieces are "substantially similar" if they include "substantially the same template or language, but vary in non-material respects such as communications customized by the recipient's name, occupation, or geographic location."<sup>5</sup> In adopting this rule, the Commission cited concerns, previously voiced when adopting the Commission's disclaimer rules, that "technological advances now permit what is basically the same communication to be personalized to include the recipient's name, occupation, geographic location, and similar variables."<sup>6</sup> Thus, the term "mass mailing"

<sup>2</sup> Though the Complaint attaches three copies of the postcard, it is apparent that there was plainly only one postcard received by Complainant, as all portions of the postcard – from the hand-written cross-outs, to the stamp placement, to the post mark and stamped bar code— are identical. See Complaint at 4-6.

<sup>3</sup> 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a).

<sup>4</sup> 11 C.F.R. §§ 100.26, 100.27.

<sup>5</sup> *Id.* § 100.27.

<sup>6</sup> *Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money; Final Rule*, 67 Fed. Reg., 49, 072 (July 29, 2002) (citing *Express Advocacy; Independent Expenditures; Corporation and Labor Organization Expenditures*, 60 Fed. Reg. 52,069, 52,070 (Oct. 5, 1995)).

only includes communications that are mass produced through technological means, not handwritten postcards like the one identified in the Complaint. And, in any case, the Complaint provides no basis to conclude that the sender sent more than 500 substantially similar postcards in any 30-day period.<sup>7</sup>

*Third*, on several occasions, Respondents encouraged individual volunteers to prepare and distribute individualized and hand-written postcards to voters in an effort to encourage them to support Mr. Janz's campaign. However, Respondents are not aware of any volunteer distributing more than 500 substantially similar postcards within a 30-day period.

Thus, there is no reason to believe that Respondents – or the sender of the postcard received by Complainant – violated the Act's disclaimer requirements.

## **II. Respondents Properly Reported In-Kind Contributions**

The Complaint also speculates that Respondents may have violated the Act by not properly reporting the postcard as an in-kind contribution. This allegation, too, is simply incorrect. As stated above, while the Complaint does not provide sufficient information for Respondents to determine who sent the postcard that was received by Complainant, Respondents have encouraged individual volunteers to prepare and distribute hand-written postcards supporting Mr. Janz's campaign. In each of those cases, Respondents treated the cost of the postage and postcards purchased by the volunteers as in-kind contributions from those volunteers, and reported those contributions as required by the Act and Commission rules.<sup>8</sup>

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<sup>7</sup> The Complaint asserts that the postcard appeared to be one of many because the sender wrote the address with one color of ink, and wrote the main body of the postcard in a different color of ink. This assertion is illogical and based on nothing other than speculation.

<sup>8</sup> The Complaint acknowledges that Andrew Janz for Congress reported receiving in-kind contributions on its FEC reports. While not a model of clarity, the Complaint appears to take issue with Respondents' method of valuing those contributions. Complaint at 1. Respondents used the method of valuation long-approved by the Commission for circumstances like this where a volunteer incurs costs for materials used while engaging in volunteer campaign activities: the proper valuation of the in-kind contribution is the cost to the volunteer of the materials – here, the cost of purchasing the postcards and the associated postage. See Advisory Opinion 1980-34. The uncompensated time spent by the volunteers preparing and distributing the postcards was not a reportable contribution. 11 C.F.R. § 100.74.

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### CONCLUSION

For the reasons described herein, there is no reason to believe that Respondents violated the Act or Commission regulations. The Commission should promptly dismiss this matter and close the file.

Very truly yours,



Andrew Harris Werbrock  
Counsel to Respondents

AHW:gcc  
(00349350)

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